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No. 07-1216

In the Supreme Court
of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Oregon Supreme Court

Brief of the States of Oregon, Delaware, Maryland, Mississippi, New Mexico, South Carolina, Tennessee and Wyoming Amici Curiae in Support of Respondent

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QUESTION PRESENTED

This case has been before this Court twice before. When the case was last here, this Court decided that the Oregon Supreme Court, in holding that the state trial court did not err in rejecting one of petitioner's requested jury instructions, had misinterpreted federal constitutional requirements. The Court remanded so that the state supreme court could apply the standard that this Court had set forth. *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940, 951 (2007). On remand, the state court decided that other aspects of petitioner's requested jury instruction were incorrect as a matter of state law. The court, therefore, affirmed, invoking the state-law rule that the failure to give a requested jury instruction is error only if the requested jury instruction is "'clear and correct in all respects, both in form and in substance, and * * * altogether free from error.'" (Pet. Cert., App. 14a, quoting *Beglau v. Albertus,* 272 Or. 170, 179, 536 P.2d 1251 (1975) (additional citations omitted).

In this setting, the question presented is whether the state court permissibly could consider and base its decision on this state-law ground and whether the state-law ground is an independent and adequate one.

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INTEREST OF THE STATE *AMICI*

This case presents two issues that are of great interest and importance to the States. Those issues are identified below. The State of Oregon also notes that, by statute, it is entitled to a portion of the punitive damages award in this case, to be applied to the State's Criminal Justice Injuries Compensation Account. Or. Rev. Stat. § 31.735. Eight other States also have statutes providing that some portion of punitive damages awards go not to the plaintiff, but to the State to be used for public purposes. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 616-17 (1996) (Ginsburg, J., dissenting) (appendix).

The first of the issues presented here that is of particular significance to the States involves the authority of state courts, on remand from this Court, to consider whether there are state procedural or substantive bars to reaching and deciding a federal constitutional issue. Petitioner argues that, when this Court determines that a state court has erred in its understanding of federal law and remands to the state court for it to apply the correct federal standard, the state court is absolutely prohibited from considering whether principles of state law or procedure bar consideration of the merits of the federal issue. The rule that petitioner advances would preclude a state court from relying on such a ground for decision, even when it is based solely on state law. Such a rule would unduly limit state courts, and would force the unnecessary decision of federal constitutional issues both by state courts and possibly by this Court.

The second important issue presented by this case is the test that should apply when determining whether a state-law substantive or procedural ground for decision is an independent and adequate state ground. Petitioner argues for a very narrow interpretation of that doctrine. The States, which often litigate the doctrine in a variety of contexts, notably in federal habeas corpus actions, have a strong interest in the continued vitality of a broad independent-and-adequate state-law doctrine, one that respects the authority of the States and of state courts.

SUMMARY OF ARGUMENT

This Court cannot review a federal constitutional issue if a state court's decision is based on an independent and adequate state-law ground. That doctrine is rooted in principles of federalism and is based on the respect that is due to state courts in fashioning their own rules of procedure. Petitioner seeks to undercut the doctrine in two significant ways. In petitioner's view, once this Court decides that a state court has misunderstood federal constitutional law and has remanded a case to state court, the state court is prohibited from deciding that an independent state-law ground bars review of the federal issue. Petitioner also suggests that a state-law ground can be adequate only when its application in a particular case flows directly from some earlier decision that is essentially on all fours.

Either point, if accepted by this Court, would unduly limit the independent-and-adequate state law doctrine. Under this Court's case law, when this Court decides a federal constitutional issue and re-

mands to state court, the state court remains free to consider whether independent state-law grounds ultimately bar a decision on the merits of the federal claim. The state court cannot take any action that is inconsistent with this Court's decision, but it can explore alternate grounds of decision that are based on state law. Any rule precluding such consideration would undermine the authority of state courts to shape their own procedures, and would force the unnecessary decision of federal constitutional issues.

This Court's jurisprudence regarding the independent-and-adequate state law doctrine also does not require that, for a state-law bar to be adequate, its application in a particular case must flow more or less directly from some prior decision that is essentially on all fours. It is enough if the application of the state-law requirement is reasonably predictable.

The independent-and-adequate state law doctrine plays a particularly significant role in federal habeas corpus cases. Any dilution of the doctrine would impact untold numbers of such cases.

ARGUMENT

As noted, when this case was last before this Court, the Court determined that the Oregon Supreme Court had misinterpreted federal law and "applied the wrong constitutional standard," and the Court remanded so that the state court could "apply the standard [the Court] ha[d] set forth." *Philip Morris USA v. Williams,* 166 L. Ed. 2d at 951. On remand, the Oregon Supreme Court determined that a state procedural rule barred review of the federal

constitutional issue. Oregon appellate practice – like the practice of many States — requires that error be assigned to specific rulings of the state trial court. Or. R. App. Proc. § 5.45. On appeal in this case, petitioner assigned error to the trial court's failure to give its requested jury instruction, but not to the instructions that the trial court gave. Because petitioner had not assigned error to the instructions actually given, when it tried to challenge those instructions before the Oregon Supreme Court, that court held that the issue had not been properly preserved before the state court of appeals. (Pet. Cert., App. 52a) (citations omitted).

Oregon procedure also has long provided that, in order for the failure to give a requested instruction to be error, the instruction must be "correct in all respects." (Pet. Cert, App 14a, 52a) (citations omitted). Invoking that rule in this case, the Oregon Supreme Court determined that the trial court had not erred in refusing to give petitioner's requested instruction. "[E]ven assuming" that the requested instruction "clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly." (Pet. Cert., App. 21a). "Accordingly, the trial court did not err in refusing to give it." *Id.*

A. Petitioner's proposal that, on remand from this Court, state courts cannot consider alternative bases for decision under state law, is not supported by this Court's case law, would unduly hamstring state courts, and would lead to the unnecessary decision of federal constitutional issues.

Before this Court, petitioner argues that the state court could not reach the issue of whether, as a matter of state law, petitioner's requested instruction was not correct in all respects. Petitioner first contends that the state court was prohibited from considering the "correct in all respects" rule because it was implicit in this Court's earlier decision that the federal constitutional issue had been properly preserved. Petitioner argues that state courts are not free to reexamine the premises that underlie this Court's decisions, even if those premises involve matters of state law and were not expressly considered or decided by this court. (Pet. Br. 18). Petitioner also argues that such implicit premises amount to the "law of the case." (Pet. Br. 21).

The rule that petitioner proposes is not supported by this Court's case law, would unduly hamstring state courts on remand from this Court, and would lead to the unnecessary decision of federal constitutional issues. This Court's implicit assumption that the federal constitutional issue had been properly raised and preserved in state court is not the law of the case. The Court did not decide the issue. *United States v. Hatter,* 532 U.S. 557, 566 (2001); *Quern v. Jordan*, 440 U.S. 332, 347 n. 18 (1979). And, while

this Court's mandate "'is controlling as to matters within its compass, on the remand a lower court is free as to other issues.'" *Quern*, 440 U.S. at 347 n. 18, quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939) (additional citation omitted). *See also Georgia Ry & Elec Co. v. City of Decatur*, 297 U.S. 620, 623 (1936) (state court free to reinterpret state statute on remand); *Konigsberg v. State Bar of California*, 366 U.S. 36, 42-43 (1961) (state court free to consider additional issue of state law on remand).

In this case, the state court simply exercised that freedom. It recognized that, under a state-law procedural rule, the failure to give petitioner's requested jury instruction was not error, even if the instruction "clearly and correctly articulated the standard required by due process[.]" (Pet. Cert., App. 21a).

The fact that the state court based its decision on an alternative ground under state law is what distinguishes this case from the ones cited by petitioner. In both *Stanton v. Stanton,* 429 U.S. 501 (1977), and *Yates v. Aiken*, 484 U.S. 211 (1988), on remand the state courts reached decisions that were at odds with this Court's earlier decision, and that were not simply based on an alternative ground. In *Sibbald v. United States,* 37 U.S. 488, 492 (1838), similarly, a state surveyor refused to comply with this Court's mandate. In *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 243 (1959), the state took a position that was directly contrary to the position that it had taken earlier in the litigation, and this Court held that the state was bound by its earlier position. And, in *Smith v. Texas*, 550 U.S. 297, 167 L. Ed. 2d 632, 644 (2007), the flaw

in the state court's decision on remand was that it was based on a misinterpretation of *federal* law.

In sum, the strict and inflexible rule suggested by petitioner would preclude state courts from reexamining on remand any premise that underlies this Court's decision, even when such a premise is based on a matter of state law. That rule is unwarranted, would unduly limit the authority of state courts, and would lead to the unnecessary consideration of federal constitutional issues. This Court should reject any rule that would absolutely prohibit state courts from considering on remand issues of state law that may bar consideration of federal constitutional issues.

B. In order for a state-law ground to be adequate, there need not be an earlier state court decision that is essentially indistinguishable; it is enough if the application of state law in the particular case is reasonably predictable.

Petitioner also argues for a very limited application of the independent and adequate state law doctrine. In petitioner's view, the doctrine should apply only when a prior state court decision is essentially indistinguishable from the present one. (Pet. Br. 13, 34-35, 40). Petitioner proposes an unduly cramped view of the doctrine, one that undermines the authority of state courts.

As this Court has recognized, "[t]he adequate-state-ground doctrine accords respect to state courts as decisionmakers by honoring their modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 369 n. 16 (1990).

The purpose of the doctrine is "to accord appropriate respect to the sovereignty of the States in our federal system." *Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979). For that reason, "[w]hen a state court refuses jurisdiction because of [or bases its decision on] a neutral state rule regarding the administration of the courts, [this Court] must act with utmost caution before deciding that it is obligated to entertain the claim." *Howlett,* 496 U.S. at 372 (citations omitted).

> The general rule "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, 54 Colum L. Rev at 508; *see also Southland Corp. v. Keating*, 465 U.S. 1, 33 (1984) (O'Connor, J., dissenting); *FERC v. Mississippi*, 456 U.S. at 774 (opinion of Powell, J). The States thus have great latitude to establish the structure and jurisprudence of their own courts.

Id. (additional citations omitted).

Petitioner's suggested approach would greatly dilute the respect afforded to state courts in matters of their own procedure and would rein in the "great latitude" to be given to state courts in such matters. Such an approach is at odds with this Court's case law. And, to reiterate, any dilution or contraction of the independent-and-adequate state law doctrine would severely impact the States, particularly in federal habeas corpus cases, which are legion and where the doctrine is often litigated.

"The accepted rule is that a state court establishes an independent and adequate state ground, barring Supreme Court review, by refusing to consider a federal question that was presented by means that do not comply with established and reasonable state procedures." Wright, Miller, and Cooper, 16B *Federal Practice and Procedure* § 4022 at 343 (2d ed 1996). To be independent and adequate, state-law grounds must not be "plainly untenable," *Ward v. Board of Cty. Commrs. of Love City,* 253 U.S. 17, 22 (1920), they cannot be entirely novel, *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457-58 (1958), they cannot amount to "an arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958), and the state-law ground must find "fair or substantial support" in state law and practice. *New York Times Co v. Sullivan*, 376 U.S. 254, 264 n. 4 (1964).

But the state-law bar need not, as petitioner suggests, have been applied previously in a decision that is almost precisely on point. Instead, unless there is good reason to suspect that the state court has invoked a state-law ground as a subterfuge or where the application of state law is truly unexpected and unforeseeable, it is sufficient if, as a general matter, the state-law rule is "'consistently or regularly applied.'" *Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989), quoting *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988). *See also Jimmy Swaggert Ministries v. Calif. Bd. Equalization*, 493 U.S. 378, 399 (1990) (state-law bar to decision of federal issue is "adequate" if "in general" it is not applied irregularly, arbitrarily, or in an inconsistent manner).

That the "correct-in-all-respects" rule invoked by the state Supreme Court in this case generally is applied consistently and predictably is what distinguishes this case from one of the cases heavily relied on by petitioner. In *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 296 (1964), it was "crystal clear" to this Court that the state-law rule applied by the state court could not even "reasonably be deemed applicable in th[e] case." If a state-law rule is not applicable at all in a case, it cannot be said that its application has been predictable and consistent.[1]

The other cases relied on by petitioner also are distinguishable. In *Osborne v. Ohio,* 495 U.S. 103, 123 (1990), the petitioner had preserved one of his federal constitutional claims in a motion to dismiss, although he had not requested a related jury instruction. In contrast here, even if petitioner raised its due process claim by arguing that part of its jury instruction comported with and accurately described federal law, nevertheless appellate reversal based on that claim is barred by the state-law rule that refusing to give a requested instruction is not error on appeal unless the instruction is correct in all respects. In order for petitioner's requested jury instruction to have

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[1] The consistency and predictability with which the "correct in all respects" rule is applied is indicated by the fact that, contrary to petitioner's assertion, the rule also was invoked by the state court when the case was before that court earlier in 2006. (Pet. Cert., App. 51a-52a). In 2006, however, the state court found a different flaw in petitioner's requested jury instruction.

passed by that requirement, the trial court would have been forced to edit it and to delete the portions of it that are incorrect as a matter of state law, which contravenes the purpose of the "correct-in-all-respects" rule.

In *Lee v. Kemna*, 534 U.S. 362, 365-66 (2002), the criminal defendant moved for a continuance orally when circumstances suddenly changed and his alibi witnesses were missing, but he failed to put the request in writing. Under the circumstances, he had no reasonable opportunity to comply with the state-law procedural requirement. In contrast here, all petitioner had to do was to submit to the trial court separately the individual legal points included in its requested jury instruction, rather than combining them all in one lengthy requested instruction.

Petitioner also contends that the "correct-in-all-respects" rule is not an independent and adequate state ground because in *State v. George*, 337 Or. 329, 97 P.3d 656 (2004), the Oregon Supreme Court held that – even though the defendant's requested instruction was not entirely correct — the trial court had erred in failing to instruct the jury on the consequences of the defendant being found guilty except for insanity. In that case, however, a state statute affirmatively placed on the trial court the responsibility to instruct the jury, "without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." *George*, 337 Or. at 339. No such affirmative statutory obligation applies in this case. Moreover, although the *George* court noted, as an alternative

ground of decision, that crafting a correct instruction would have been an "exercise in futility," *id.,* and although petitioner argues that also would have been true in this case, the state Supreme Court disagreed that would have been true here. The court rejected petitioner's "assertion that any further or different effort by it respecting the instruction would have been 'futile.'" (Pet. Cert., App. 16a n. 5). "The record throughout belies that idea: The trial judge was solicitous of, and at pains to consider, the views of both parties respecting instructions." *Id.* Thus, *George* is readily distinguishable from this case. No statute required the trial court to give any particular instruction on punitive damages, even absent a legally correct request, and it would not have been futile for petitioner to have sought to craft an instruction that was correct in all respects.

In sum, petitioner urges an unduly crabbed and ungenerous view of the doctrine of the independent and adequate state ground. In order for a state-law bar to be adequate in a particular case, it need not result directly from application of some prior case that is essentially on all fours. It is instead enough if the application of the bar is reasonably predictable and foreseeable. The Court should not accept petitioner's invitation to strictly limit the independent-and-adequate state-ground doctrine.

CONCLUSION

The *amici* States urge this Court to decline petitioner's invitation to curb the independent-and-adequate state-law doctrine. The doctrine is rooted in federalism and in the respect that is owed to the

States and to state courts. Restricting the doctrine undermines those principles, limits the authority of States and of state courts, and would lead to the unnecessary resolution of federal constitutional issues.

Respectfully submitted,

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APPENDIX A

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